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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 350.

NORTHERN PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

R. P. WALL, AS ADMINISTRATOR OF THE ESTATE OF R. J. WALL, DECEASED, DEFENDANT IN ERROR.

MOTION TO DISMISS OR AFFIRM OR TRANSFER TO SUMMARY DOCKET.

WALTER AITKEN,
Attorney for Defendant in Error.

THOMAS J. WALSH,
Of Counsel.

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Authorities Cited.

ground that this court has not jurisdiction thereof, no Federal question being involved therein.

Second. To affirm the judgment of the Supreme Court of the State of Montana, upon the ground that it is manifest that this writ of error was taken for delay only.

Third. To transfer this cause for hearing to the summary docket, if this court should decline to dismiss or affirm, because the case is of such a character as not to justify extended argument.

WALTER AITKEN,
Of Belgrade, Montana,
Attorney of Record for Defendant in Error.

T. J. WALSH,
Of Helena, Montana,
Of Counsel.

NOTICE OF MOTION.

The plaintiff in error is hereby notified that the defendant in error will on the 11th day of October, 1915, on the convening of the Supreme Court of the United States on that day, or as soon thereafter as a hearing may be had, submit for the consideration of the said court the foregoing motions, and each of them, and the brief in support thereof, hereto attached, including portions of the record, all of which are now herewith served upon you.

WALTER AITKEN,
Of Belgrade, Montana,
Attorney of Record for Defendant in Error.

T. J. WALSH,
Of Helena, Montana,
Of Counsel.

Copy of foregoing motion and notice, together with statement of facts, points and authorities and argument, received this 28th day of June, 1915.

C. W. BUNN,
CHARLES DONNELLY,
GUNN & RASCH,
E. M. HALL,
Attorneys of Record for Plaintiff in Error.

STATEMENT OF THE CASE.

On the 2d day of January, 1912, R. J. Wall delivered to Northern Pacific Railway Company, plaintiff in error, at Belgrade, Montana, on the main line of said railway, 101 head of beef cattle for transportation to Union Stock Yards, Chicago, via the line of plaintiff in error to St. Paul, Minnesota, and thence via the line of Chicago, Burlington & Quincy Railroad to destination. The cattle did not reach their destination until January 15, 1912, and this action was instituted in the District Court of the Ninth Judicial District of the State of Montana in and for the county of Gallatin against plaintiff in error as the initial carrier, to recover damages resulting from delay in transportation alleged to be due to the negligence of plaintiff in error. The complaint declared upon the common-law liability of the carrier. Plaintiff in error answered, setting up, among other defenses, a certain special contract under which the cattle were shipped, alleging that the provisions of said special contract had been "established, made and prescribed as just and reasonable terms and regulations for the handling, transportation and delivery of interstate shipments of livestock, pursuant to the authority conferred upon it by virtue of and pursuant to the authority conferred upon it by section 7 of an act of Congress, entitled 'An act to create a commerce court' and to amend an act entitled 'An act to regulate commerce,' approved February 4, 1887, as heretofore amended, and for other purposes." Plaintiff in error relied especially upon the provision of the contract (par. 6) relating to notice of claim for damages, which reads as follows:

> "The said shipper further agrees that as a condition precedent to his right to recover any damages for loss or injury to any of said stock, he will give notice in writing of his claim therefor to some officer or station agent of the said company before said stock has been removed from the place of destination or mingled with other stock."

There was also a general denial of any negligence on the part of plaintiff in error in the transportation of said livestock.

Defendant in error replied, admitting the execution of the special contract referred to, that it contained the provision quoted above and that he had not complied therewith, but alleging that said provision

> * * * "is unreasonable, unjust, burdensome, against the policy of the law, and contrary to the express provisions of chapter 138 of the Session Laws of the State of Montana for 1909."

In the judgment of defendant in error the foregoing summary of the pleadings is all that it is necessary to set forth herein for the purposes of this motion.

There was no appearance whatever by the C., B. & Q. Railroad Company, the connecting carrier from St. Paul.

There was trial and judgment for defendant in error, motions for nonsuit and directed verdict by plaintiff in error having been overruled, as was likewise its motion for a new trial. Plaintiff in error appealed to the Supreme Court of Montana, where the judgment of the lower court was affirmed.

> Wall *vs.* Northern Pac. Ry., 50 Mont., 145 Pac., 291.

Plaintiff in error has brought the case here, making the following

Assignments of Error.

I.

That said court erred in holding and deciding that paragraph 6 of the livestock contract, under which the stock were shipped from the State of Montana to the State of Illinois, was unreasonable and not binding upon the shipper,

thereby denying plaintiff in error certain rights and privileges given it under the act of Congress of February 4, 1887, entitled, "An act to regulate commerce," and amendments thereto. Paragraph 6 of said contract, reads as follows, to wit:

> "6. The said shipper further agrees that as a condition precedent to his right to recover any damages for loss or injury to any of said stock, he will give notice in writing of his claim therefor to some officer or station agent of the said company before said stock has been removed from the place of destination or mingled with other stock."

II.

That said court erred in so holding and deciding that said paragraph 6 of said livestock contract was unreasonable and not binding upon the shipper when read in connection with paragraph 9 of said contract, which reads as follows, to wit:

> "9. The terms, conditions, and limitations hereby imposed shall inure to the benefit of each and every carrier, beyond the route of said company, to which the said property may come for purpose of transportation."

III.

The court erred in holding and deciding that the shipper was not bound by said livestock contract and could sue for a breach of a carrier's common-law liability.

IV.

The court erred in holding and deciding that when the shipper sued in tort for a breach of the carrier's common-law liability, and the pleadings and evidence disclosed that the shipment was received and transported under and pur-

suant to the terms of a special livestock contract, that there was no fatal variance between the cause of action alleged and the proof.

V.

The court erred in holding and deciding that the burden of proof is not upon the shipper to prove negligence when he or his agents accompany his stock shipped under a special contract which provides that "The company shall not be liable for the loss or death of or injuries to the stock unless the same is caused by the negligence of said company, its agents or employees," and also provides, "The said shipper agrees that said shipment shall be accompanied by one or more attendants, according to the rules of the company, who shall have authority to represent the shipper in all matters pertaining to the resting, feeding, stopping, and general care and handling of the stock."

VI.

The court erred in holding and deciding that instruction No. 24, as given by the trial court, was a proper instruction on the burden of proof in said case. Said instruction reads as follows:

> "The court instructs the jury that if they find from the evidence in the case that the cattle described in the complaint, or any of them, died or were injured while in the custody and care of the defendant, and such death or injury was not the result of some inherent want of vitality, or of injuries inflicted by such cattle upon each other, or by unavoidable accident, the defendant will be liable: unless it is established by a preponderance of the evidence that such death or injury was occasioned by some other cause than the negligence of the defendant, and in the absence of such proof the law will presume negligence on the part of the defendant."

VII.

The court erred in not holding and deciding that paragraph 2 of said livestock contract was binding upon the shipper and that he was thereby precluded from recovering damages for the reason that the evidence showed that whatever damages or delays there may have been arose from the inclemency of the weather and the action of the elements, the risks of damages from which he assumed, and that there was no substantial evidence to the contrary. Paragraph 2 of said contract reads as follows, to wit:

> "The shipper assumes all risks of damage or delay to his stock arising from or incident to the inclemency of the weather and the action of the elements, knowing that said stock is liable to be exposed to danger and risk therefrom, and hereby releases the company from all liability for damages caused thereby."

VIII.

The court erred in not reversing the judgment of the trial court and in not upholding the rights of the plaintiff in error under the said statutes of the United States and sustaining the validity of the contract of shipment executed under the authority conferred by said statutes.

ARGUMENT.

The contention of the defendant in error on this motion is that the assignments of error, in the light of the record, present no Federal question in view of which the revisory power of this court can be invoked. If there is any such question it is covered by assignments of error numbers one and two.

It is true that the answer sets up a claim that the act of Congress referred to justifies the incorporation in the special contract of transportation of the clause requiring notice of claim. But the opinion of the Montana court concedes the validity of the limitation prescribed by the clause in question; merely asserting that the defendant appealing to it must, and that the plaintiff in error did not, bring itself by appropriate pleadings and proof within the spirit of the clause. The opinion says:

> "There is not a suggestion in the contract, in the pleading or the proof, that the Northern Pacific Company had an officer or station agent at Chicago, or nearer than St. Paul, the eastern terminus of the road—more than 400 miles away."

It is unnecessary to enter upon any inquiry as to whether the clause of the contract must depend for its validity upon the Federal statute appealed to, or whether the general law justifies it, for the court admits its vitality. It holds, however, that the clause cannot be construed to require notice to be given to a station agent when there is none within a distance of four hundred miles. It is not applicable to such conditions as are shown to exist. The court's decision turned upon the construction to be given to the important clause in the contract, not upon the construction which should be given to the statute. The court held, indeed, that the burden was upon the plaintiff in error to show that there was a station agent within a reasonable distance to whom notice

could be given, but that was not important to the decision, because it appears that there was not. If the clause had provided that notice must be given though there should be no agent within four hundred miles or some other reasonable distance, the question would then arise as to whether the statute justifies such a provision, for certainly the common law does not. On that question the case might be set down for summary hearing, for such an unreasonable contention ought not to be entitled to protracted debate. But even such a shadowy claim cannot be urged, for the court holds that the clause in question is not to be construed as though it in terms required notice under any and all supposable conditions, and particularly under the conditions disclosed in this case. An alleged error in the construction of a contract presents no Federal question.

Commercial Publishing Co. *vs.* Beckwith, 188 U. S., 567.

As to assignment of error number three, a reference to the opinion of the Supreme Court of Montana will disclose that there is no holding or decision by that court that the shipper was not bound by the provisions of the special contract. On the contrary, in so far as the Montana court construes the contract at all, the holding is that the special contract, when supported by appropriate pleading and proof as to reasonableness, is in all of its provisions valid and binding upon the shipper and operates to limit the common-law liability of the carrier within the scope of its terms.

Assignments of error numbers IV, V, VI, VII, and VIII do not, it is respectfully submitted, raise any Federal question whatever. All of them relate to the holding and decision of the Montana Supreme Court upon general principles of law or questions of fact; all of which, as held by this court in many cases, are foreclosed in this case by the decision already rendered.

As to decisions on general principles of law:

Arkansas So. Ry. Co. *vs.* German Nat. Bank, 207 U. S., 270; 28 Sup. Ct., 78.

Western Union Tel. Co. *vs.* Wilson, 213 U. S., 52; 29 Sup. Ct., 403.

Sayward *vs.* Denny, 158 U. S., 489.

As to questions of fact:

Missouri, K. & T. R. Co. *vs.* Harriman Bros., 227 U. S., 657; 33 Sup. Ct., 397.

Chrisman *vs.* Miller, 197 U. S., 313; 25 Sup. Ct., 468.

King *vs.* West Virginia, 216 U. S., 92; 30 Sup. Ct., 225.

Clipper Min. Co. *vs.* Eli Min. Co., 194 U. S., 220; 24 Sup. Ct., 632.

Smiley *vs.* Kansas, 196 U. S., 447; 25 Sup. Ct., 289.

Therefore, defendant in error respectfully submits that the present litigation, in which he has heretofore been successful at every stage, has pended for three years; that the expense and long delay incident to appellate procedure have caused great annoyance and inconvenience; that the writ of error is taken for delay only, and the contentions upon which it is claimed a Federal question depends are so apparently unfounded as not to require further argument.

Parker *vs.* McLain, 35 Sup. Ct., 632.

WALTER AITKEN,
Of Belgrade, Montana,
Attorney for Defendant in Error.

T. J. WALSH,
Of Helena, Montana, of Counsel.

[Endorsed:] 35,015/24,559. Supreme Court of the United States, October Term, 1915. No. 815. Northern Pacific Railway Company, plaintiff in error, *vs.* R. P. Wall, as administrator of the estate of R. J. Wall, deceased, defendant in error. Motion to dismiss or affirm or transfer to summary docket. Walter Aitken, attorney of record for defendant in error; T. J. Walsh, of counsel.

[Endorsed:] Oct. 11, '15. File No. 24,559. Supreme Court U. S., October term, 1915. Term No. 350. Northern Pacific Railway Co., pl'ff in error, *vs.* R. P. Wall, as administrator, etc. Motion to dismiss or affirm or place on summary docket, notice, and proof of service of same. Filed July 6, 1915.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 350.

NORTHERN PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

R. P. WALL, AS ADMINISTRATOR OF THE ESTATE OF R. J. WALL, DECEASED, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

WALTER AITKIN,
Attorney for Defendant in Error.

THOMAS J. WALSH,
Of Counsel.

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SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

The defendant in error submits this brief in elaboration of the argument presented with the motion to dismiss or affirm or to advance, understanding that the order of the court leaves undetermined the question of jurisdiction presented in connection with the motion.

I. The Carmack Amendment as a Foundation for the Case Unimportant.

The action does, indeed, bring into the case the Carmack Amendment. In it the defendant in error seeks to recover damages of his adversary, the initial carrier, on account of

delays in a shipment of cattle occurring at various places along its line and that of a connecting carrier. The contract of shipment made with the plaintiff in error contained the following stipulation, viz:

> "The said shipper further agrees that as a condition precedent to his right to recover damages for loss or injury to any of said stock, he will give notice in writing of his claim therefor to some officer or station agent of *the said company* (the plaintiff in error) before said stock has been removed from the place of destination or mingled with other stock."
> Opinion of State Court, Rec., p. 165.

"The said company" (the Northern Pacific Railway Company) had no officer or station agent within four hundred miles of "the place of destination," the city of Chicago, where they were eventually unloaded, the nearest point where any such officer or agent could be found being at St. Paul, Minnesota.

Id.

The court held that in the absence of pleading and proof that there was an officer or agent of the Northern Pacific Railway Company at the place of destination to whom the notice could be given, the plaintiff in error could not defeat a recovery because such notice was not given.

Rec., pp. 165-167.

It is true that the right of the defendant in error to recover of the plaintiff in error such damages as resulted from the negligence of the connecting carrier rests upon the Carmack Amendment. But that fact, of itself, is not sufficient to present a "Federal question" authorizing a review in this court.

> "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under these laws, for a suit does not so arise unless it really and sub-

stantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends."

Shulthis *vs.* McDougal, 225 U. S., 561-569.

Proposition Urged Here Not Raised by the Record.

It must appear that the State court passed upon the validity, construction or effect of the Carmack Amendment adverse to some contention with respect thereto made by the plaintiff in error, and that its judgment rests upon the conclusion reached in relation thereto.

What was the contention made by the plaintiff in error concerning the construction or effect of that law, for its validity certainly was not a subject of consideration?

It is not clearly stated, but as it is here made it is, in substance, that by virtue of the law appealed to the contract quoted, though it reads that notice is to be given to "some officer or station agent of *the said company,*" that is to say, the Northern Pacific Railway Company, is to be construed as though it read to "some officer or station agent of the said company or of any connecting carrier;" or, perhaps, that by virtue of the Carmack Amendment all officers and station agents of the connecting carrier are, for the purpose of notice, officers and station agents of the Northern Pacific Railway Company.

But if any such contention was made in the State court the opinion gives no intimation of it. The court says,

> "There is not a suggestion in the contract, in the pleadings, or the proof that the Northern Pacific Company had an officer or station agent at Chicago, or nearer than St. Paul, the eastern terminus of the road—more than 400 miles away."

If it had been intelligently or intelligibly urged that in view of the Carmack Amendment the station agent at Chicago of the connecting carrier, the Chicago, Burlington & Quincy, or any officer of that company is *pro hac vice* an officer or

agent of the Northern Pacific, it is passing strange that the Supreme Court of Montana did not notice the claim in connection with the remark quoted.

Referring to the language of the paragraph from the shipping contract under consideration, in terms requiring that notice be given to the initial carrier, the court said:

> "If the paragraph above means anything, it required the shipper to give notice in writing to an officer or station agent of the Northern Pacific Company. Notice to an agent of the Burlington road would not have been effective for any purpose."

The plaintiff in error could not have made it very clear to the court that it maintained that reading the Carmack Amendment into the contract it was to be construed as though it stipulated that notice might be given to either company.

As the brief of the plaintiff in error in the State court is not a part of the record, no opportunity is afforded this court to know what it claimed therein, and it is unimportant to know, because under repeated rulings it must appear that the Federal question was properly presented for review by appropriate exceptions taken below and preserved in the bill, unless it appears on the face of the judgment roll.

The answer does not suggest that notice to the Burlington's officers or station agent would have been sufficient under the contract, considering the Carmack Amendment; the motion for a nonsuit did not suggest that the action had failed for want of proof of notice to the Burlington, adequate under the Carmack Amendment (Rec., pp. 65-66). The motion for a peremptory instruction at the close of the testimony referred to the failure to give notice, but no mention was made that the Carmack Amendment was involved or that the requirement of the contract could be discharged, in view of its terms, by notice to the Burlington. It is obvious from the remarks of the trial judge that his mind was never directed to any such contention.

Rec., pp. 132-133.

No instruction was asked embodying any such principle of law and none given denying it. Exceptions to instructions are found at

Rec., pp. 133-136.

In

Mutual Life Ins. Co. *vs.* McGrew, 188 U. S., 291-308,

this court said:

> "Our jurisdiction of this writ of error is asserted under the third class of cases enumerated in sec. 709, and it is thoroughly settled that in order to maintain it, the right, title, privilege or immunity relied on must not only be specially set up or claimed, but at the proper time and in the proper way.
>
> "The proper time is in the trial court whenever that is required by the State practice, in accordance with which the highest court of a State will not revise the judgment of the court below on questions not therein raised. *Spies vs. Illinois*, 123 U. S., 131; *Jacobi vs. Alabama*, 187 U. S., 133; *Layton vs. Missouri*, 187 U. S., 356; *Erie Railroad Company vs. Purdy*, 185 U. S., 148.
>
> "The proper way is by pleading, motion, exception, or other action, part, or being made part, of the record, showing that the claim was presented to the court. *Loeb vs. Trustees*, 179 U. S., 472, 481. It is not properly made when made for the first time in a petition for rehearing after judgment; or in the petition for writ of error; or in the briefs of counsel not made part of the record. *Sayward vs. Denny*, 158 U. S., 180; *Zadig vs. Baldwin*, 166 U. S., 485, 488. The assertion of the right must be made unmistakably and not left to mere inference. *Oxley Stave Company vs. Butler County*, 166 U. S., 648."

Tested by the rule thus announced, there is no "Federal question" raised by this record.

It is true that

> "If the highest court of a State entertains a petition for rehearing, which raises Federal questions,

and decides them, that will be sufficient; Mallett *vs.* North Carolina, 181 U. S., 589; or if the court decides a Federal question which it assumes is distinctly presented to it in some way. *Home for Incurables vs. New York,* 187 U. S., 155; *Sweringen vs. St. Louis,* 185 U. S., 38, 46."

Id.

But the court, as appears from its opinion, did not pass upon any such question as that suggested above, namely, as to whether the expression "said company" in the contract, plainly referring to the Northern Pacific Company, as the court states, should not, in view of the Carmack Amendment, be construed to refer to the Burlington Company as well, or whether, in view of that statute, the officers of that company and its station agents did not become for the occasion the officers and agents of the Northern Pacific Company.

III. The Case as to Notice Turned on a Question of Pleading.

What the court did decide was that as a matter of practice the burden was on the plaintiff in error to plead and to prove not only the special contract under which it claimed to have escaped liability, but the facts showing that under the circumstances attending this particular shipment the contract was reasonable—namely, that the "said company" had either officers or station agents at the place of destination, the shipper knowing where to find them, or they being where he could have found them by reasonably diligent inquiry.

The rule of pleading in such a case is one in respect to which courts differ, some holding that the shipper is obliged to set up facts showing that under the particular circumstances of the case such a provision of a shipping contract is unreasonable, as, for instance, that there was neither station agent nor officer at the place of destination, or that the injuries were of such a character as that they could not be and were not discerned before they were taken

away or mingled with other stock. The contraction of disease through failure to disinfect contaminated cars might present such a condition. Other courts hold that the shipper relying on the exemption clause must show it to be reasonable as applied to the case in which it is relied upon.

The conflicting views are exhibited, with a reference to cases, in

4 Elliott on Railroads, 1512.

The Supreme Court of Montana aligns itself by the decision sought to be reviewed with the courts adhering to the doctrine last above referred to. The subject receives elaborate consideration in the opinion in

Houtz *vs.* U. P. Ry. Co., 17 L. R. A., 628 (N. S.),

referrred to in the opinion of the Montana court. The conclusion arrived at in that case is expressed in the following language:

> "The weight of authority also seems to be that, in an action where there is a plea of a special contract in defense limiting or conditioning the carrier's liability, the burden is upon the carrier, not only to show a valid special contract but also to allege and prove facts and circumstances showing the stipulation to be reasonable."

The same rule of pleading was announced in the case of

M. P. R. Co. *vs.* Harris, 61 Tex., 166,

from the opinion in which the State court quotes at length.

It is said in the brief of plaintiff in error on the motion in consequence of which this cause is set down for argument that that case was decided before the passage of the Carmack Amendment. But the authority is not weakened by reason of that fact. It simply declares the proper rule of pleading. If it was necessary before the Carmack Amendment that the carrier plead and prove the facts showing the contract to be reasonable, it certainly must do so now,

that is, if under the language of the contract the shipper was obliged to give notice or might give notice to some officer or agent of the connecting carrier, it must be averred as a part of the defense that such connecting carrier had, at the place of destination, an officer or station agent to whom notice might be given.

The Montana court may be right or it may be wrong in the rule of pleading which it prescribed in this case, for the failure to observe which it held that the plaintiff in error could not defeat a recovery under the stipulation in the contract to which it appealed, or to put it in other language, that, the plaintiff in error not having shown by its pleadings and proof that the clause in question is reasonable, it must be held unreasonable and void. But whether it was right or wrong in its ruling on a question of pleading cannot be inquired into in this court.

Referring to the answer of the plaintiff in error (Rec., p. 5), it will be seen that although the clause of the contract on which reliance is placed is set up, and (*Id.*, 6) it is averred that no notice was given, there is no averment that either the Northern Pacific or the Burlington had either an officer or a station agent at Chicago to whom notice could be given.

It was because of the want of either pleading or proof on that point that the plaintiff in error found itself unable to defeat a recovery. The conclusion of the court is expressed in this language:

> "The validity of paragraph 6 above depends upon its reasonableness, and it was therefore incumbent upon the carrier to show that it was relieved by the provision of a contract valid; in this instance reasonable (Houtz *vs.* Union Pac. R. R. Co., 33 Utah, 175; 93 Pac., 439; 17 L. R. A. (N. S.), 628, and note)."

IV. Waiving Question of Pleading Case is one of Construction of Contract.

But even if the conditions adverted to were not decisive, the plaintiff in error is not entitled to a review here. It is conceded, apparently, that there was no obligation to give notice to an officer or station agent of the Northern Pacific Railway, except in the sense that persons bearing such relation to the Burlingon were, for the occasion and under the true construction of the contract, representing the former company. But whether they were or were not obviously depends upon the proper interpretation to be given to the contract. It plainly says that the notice *must* be given to some officer or agent of the Northern Pacific Company. It might very easily be framed so as to require in express terms that notice should or might be given to the connecting carrier in the case of a shipment terminating beyond its own line. It chose not to do so. Unquestionably the language of the contract is the railway company's own selection. The court takes judicial notice of the fact that these shipping contracts are executed upon blanks provided by the railway company just as it takes judicial notice that insurance contracts are written upon blanks furnished by the companies taking the risk. The brief of plaintiff in error says: "The clause in question was a *standard* clause appearing in the *forms* of nearly all carriers."

Brief, p. 11.

Under these conditions the court is required to give to the provision the construction least favorable to the railway company. The cases in this court need not be referred to. They are legion.

Moreover, the clause is intended to limit and restrict the common-law liability of a common carrier, and for that reason should receive a strict construction against it.

It is an exceedingly sound doctrine for any court to an-

nounce that if the initial carrier desires to evade liability in the case of stock unloaded at their destination on the line of a connecting carrier, by a requirement of notice to an officer or agent of the latter, it should say so in plain terms and not seek to entrap the shipper by language which by its terms indicates that a notice to them would be futile, and that it should be given to an officer or agent of the initial carrier. It is expecting rather too much of the shipper, it is laying on him a burden he ought not to bear to say that he must apply the Carmack Amendment to the language of his shipping contract and from it reach the conclusion that the agents and officers of the connecting carrier are, in fact, agents and officers of the initial carrier with whom the contract was made. It is of no consequence that it has been held when the carrier was seeking to evade responsibility that he could not escape liability if notice was given to the station agent or some proper officer of the connecting carrier. In every case the contract is to be construed most favorably to the shipper.

But suppose that the court was wrong when it said "notice to an agent of the Burlington road would not have been effective for any purpose." The Carmack Amendment does not *say* that it would be. That conclusion is to be reached by a proper interpretation of the contract, it is said, in the light of the law. Every contract is interpreted in the light of the law. And the purpose of interpretation is to ascertain what the parties meant by the language they used. Did the parties mean when they said that notice should be given to "said company" to signify that notice might be given to an officer or agent of the Burlington? The court says they did not. Suppose it was wrong in that conclusion. Such an error is not reviewable here. The proper construction of a contract does not present a Federal question. If it did, it is ventured that the court properly construed the contract.

But that is neither here nor there. The case was decided

against the plaintiff in error because it had not presented the defense it attempted to assert by any proper pleading.

> "To give the Supreme Court jurisdiction of a writ of error to a State court it must appear not only that a Federal question was presented for decision, but that its decision was necessary to the determination of the case, and that it actually was decided, or that the judgment could not have been rendered without deciding it."
>
> Adams *vs.* Russell, 229 U. S., 353.

The writ should be dismissed or the judgment affirmed.

Respectfully submitted,

WALTER AITKIN,
Attorney for Defendant in Error.

THOMAS J. WALSH,
Of Counsel.